

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge  
DeAndrea G. Benjamin, Circuit Court Judge

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RECEIVED

JUN - 8 2015

S.C. Supreme Court

Case No. 2010-CP-40-3297  
Unpublished Opinion No. 2015-UP-042  
Appellate Case No. 2015-000739

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YANCEY ENVIRONMENTAL SOLUTIONS, LLC. . . . . Petitioner,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and  
George Harold Hanlin, J.D. . . . . Respondents.

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**REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Counsel for Petitioner

Respondents were hired by Petitioner (Yancey) to serve as the lawyers for a complex conservation easement on property owned by a corporation. Yancey had been retained by the corporation and its principal to serve as a consultant for the transaction, bringing together the lawyers, abstractors, appraisers, 501(c)(3) donee and other professionals necessary to close on the easement by December 31, 2007 for tax purposes. Closing by December 31, 2007 was a critical requirement because significant tax changes in 2008 substantially reduced the tax deductions available for conservation easements recorded after 2007.

Respondents essentially represented the transaction and, when they quit a few days before the end of the year over misplaced concerns about an IRS investigation, Respondents “killed this deal.”<sup>1</sup> Because Respondents had withdrawn as legal counsel for the closing, Yancey recommended the transaction be postponed and not close as planned by December 31, 2007. This was critical because, as Respondent Hanlin testified, the tax laws changed for conservation easement recorded in 2008 and after, substantially reducing the incentive for a landowner to record and easement.<sup>2</sup> These tax law changes were a primary reason that closing by December 31, 2007 was a requirement.

After speaking to the corporation’s principal owner to prepare for the corporation’s testimony, the corporation’s designee testified about its intent to close on the easement before the end of the 2007 tax year. The corporation’s designee

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<sup>1</sup> App. 268, line 23.

<sup>2</sup> App. 742.

also testified that notwithstanding the IRS investigation, they would have completed the closing in 2007 if Yancey had recommended they do so.

**I. Evidence and Reasonable Inferences From the Evidence of the Tax-Based Requirement to Close In 2007 Was In the Record and Presented to the Jury.**

The Court of Appeals initially found that “the evidence shows that Justice Family Farms, LLC was planning on recording a conservation easement on Black River Farms in 2007.”<sup>3</sup> Then the Court of Appeals found that there was no evidence that the transaction had to be completed by the end of the year.<sup>4</sup> This finding was in error based upon Respondent Hanlin’s trial testimony that “we knew that the favorable tax situation was going to expire at the end of 2007.”<sup>5</sup> Respondent Hanlin testified during trial at length about specific tax benefits that would not be available for conservation easements recorded in 2008 and after.<sup>6</sup> One can reasonably infer that it was indeed a requirement to record the transaction by December 31, 2007, as established by the hundreds of references in the record by the jury to the tax incentives for the corporation to record the easement. The Court of Appeals’ ruling to the contrary was in error and in conflict with long-standing jurisprudence by this Court.<sup>7</sup>

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<sup>3</sup> App. 1313.

<sup>4</sup> App. 1313.

<sup>5</sup> App. 742.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 366, 759 S.E.2d 139, 141 (2014) (“When reviewing a ruling on a motion for a directed verdict, we must view the evidence and all reasonable inferences in the light most favorable to the

There was more than a scintilla of evidence in the record and inferences from the evidence in the record that the easement was required to be recorded before the end of 2007 in order to take advantage of particular tax incentives for the Justice Companies.<sup>8</sup> It was clear that all parties, Yancey, the appraisers, the 501(c)(3) designee, Justice Companies and even Respondents, were operating under a belief that closing on the easement before the end of 2007 was a requirement. In fact, as soon as Mr. McLeod learned that Respondents were withdrawing from representation literally days before the end of 2007, he hung up the phone and turned to his office manager and said “Mary, Hal just told me that Richardson Plowden had terminated all relationships with me immediately. I don’t have any choice but to call Jim Justice and recommend he postpone this project.”<sup>9</sup> If there were no adverse changes in the tax laws for easements recorded in 2008 and after and therefore no *requirement* to close by the end of 2007, one can reasonably infer that Yancey would have had plenty of time to find replacement counsel and continue on with completing the conservation easement after 2007. It was error and in conflict with prior Supreme Court precedent for the Court of Appeals to construe such reasonable inferences from the record against Yancey.<sup>10</sup>

While Respondents attempt to make hay out of the difference between “intent” and “requirement,” in this case, they are the same. All parties involved in

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nonmoving party.”)

<sup>8</sup> See PETITION FOR WRIT at 11-18.

<sup>9</sup> App. 454, line 18 - 22; App. 1235.

<sup>10</sup> See *id.*

the conservation easement were operating with the intent to close by the end of 2007 because closing by that date was required to take advantage of the tax benefits that were going to expire at the end of that tax year. The Justice corporate designee testified that the conservation easement “would have *had* to been in place by December 31<sup>st</sup> for us to take tax advantages of the easement being recorded and in place.”<sup>11</sup> This is evidence of the “requirement” for the transaction to be completed before the end of 2007. The corporate designee further testified that it was the corporation’s “intent to move forward with this easement . . . and it was our intent to have it done by the end of the year for tax advantages.”<sup>12</sup> The evidence of the requirement was on the record, evidence of the corporation’s intent only served to further support the state of mind of the corporation in closing on the easement had all the requirements been met. In this matter, intent to close equals requirement to close, it is a distinction without a difference.

**II. The Testimony of Mr. Justice Was Never Required to Establish Proximate Cause.**

Mr. Justice, individually, was not the owner of the property and he would not have signed – in an individual capacity – any documents necessary to close the easement. His testimony, therefore, was never required to establish proximate cause.

Mr. Justice is a billionaire who runs the Justice Companies, of which there are many. The property over which the conservation easement was to be placed

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<sup>11</sup> App. 911, line 2 - 5.

<sup>12</sup> App. 898, line 2 - 5.

is owned by Justice Family Farms, LLC (JFF), one of the Justice Companies.<sup>13</sup> The law allows for this type of corporate structure to be established for tax reasons and other purposes and one of those purposes can be to protect important and an individual from being required to testify in person in small lawsuits directly related to the property, such as a trip and fall injury that occurred on the property or, especially, indirectly like the matter at hand. The law in South Carolina does not require any company to have its principal owner provide individual testimony on behalf of the company, even if the company is owned by the likes of Bill Gates or Warren Buffett, or by a typical South Carolinian who may not be a public figure. Instead, the company would designate a 30(b)(6) witness to testify on its behalf. That is what was done in this case and the trial court wrongly found that the testimony from the JFF designee was not enough.

In this matter, Yancey further showed that the JFF designee was selected by Mr. Justice and spoke with Mr. Justice prior to being deposed.<sup>14</sup> To the extent Mr. Justice's intent and testimony was the corporation's intent and testimony, that evidence was presented to the jury.

In addition, Yancey attempted to present the testimony of the JFF designee that had Yancey recommended that the company move forward with the conservation easement despite the IRS letter, it is more likely than not that the

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<sup>13</sup> Respondents' arguments about JFF's corporate status and relationship to the subject property are immaterial based on the commonality of corporate ownership and management.

<sup>14</sup> App. 923, line 11 - 17; App. 924, line 16 - App. 925, line 12.

company would have moved forward with the easement.<sup>15</sup> Respondents fought to keep that testimony from the jury and the trial court improperly excluded this testimony.

Further, JFF was party to the contract, was on the check that paid Yancey, and was fully involved in the partial performance of the contract with Yancey. JFF's testimony was sufficient to establish the intent to close on the conservation easement.<sup>16</sup> The trial court wrongly found otherwise. The Court of Appeals did not address the trial court's reasoning for granting directed verdict and went on to affirm the directed verdict, on completely unrelated and incorrect grounds, erroneously finding that there was no evidence on the record that the easement was required to close in 2007.

**III. Yancey preserved the issues regarding evidence that was improperly excluded by the trial court.**

Respondents have attempted to argue that Petitioner failed to fully brief the issues regarding evidence improperly excluded by the trial court. However, Petitioner has sufficiently raised the issues to preserve them for full briefing in the hopeful event this Court grants the Petition.<sup>17</sup> Plaintiff has sufficiently preserved the issues regarding evidence that was improperly excluded by the trial court.

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<sup>15</sup> App. 912, line 2 - 15.

<sup>16</sup> See *U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) ("The rule 30(b)(6) designee does not give his personal opinions. Rather, he presents the corporation's 'position' on the topic. Moreover, the designee must not only testify about the facts within the corporation's knowledge, but also its subjective beliefs and opinions.")

<sup>17</sup> See Rule 242(i), SCACR.

**IV. Yancey preserved the issues regarding the varying standards of proof for each of its causes of actions.**

Respondents incorrectly argue that Yancey failed to preserve the issue of the varying standards of proof to establish proximate cause as distinguished between claims for professional negligence, breach of fiduciary duty, and breach of contract. In fact, Yancey argued these exact issue as early as its Memorandum in Opposition to Defendants' Motion for Summary Judgment, which was presented to and argued before the same trial judge.<sup>18</sup> Yancey also presented the issues regarding the varying standards of proximate cause for its three causes of action at the trial during arguments over whether its expert could present testimony regarding a draft Conservation Easement and the duties Respondents owed Yancey.<sup>19</sup> Further, Yancey made specific arguments regarding the varying standards of proximate cause for its three causes of action during arguments on Respondents first Rule 50 motion.<sup>20</sup> In addition, and most importantly, Yancey made references regarding the varying standards of proximate cause for its three causes of action during arguments on Respondents second Rule 50 motion.<sup>21</sup>

At the time the trial court granted the second DV motion, the Court specifically requested that Yancey file a motion to reconsider based on the content

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<sup>18</sup> Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 6-9, not included in the Record on Appeal or Appendix.

<sup>19</sup> App. 167:1-178:17.

<sup>20</sup> Trial Transcript, 856:3-9, 859:7-22, and 863:9-19, not included in Record on Appeal or Appendix, cited to show issue preserved at trial, subject to subsequent briefing as per direction of the trial court without objection. See *also* App. 687:2-24.

<sup>21</sup> App. 858:22-860:10 and 869:25-870:8.

of the written order that was to be filed. The trial court: "Let's do a written order, you [Yancey] make a motion to reconsider and I'll do that, I think that would be good for your record, considering everything that is here."<sup>22</sup> Yancey's Rule 59 motion, filed at the trial court's request, fully briefed the issues regarding the varying standards of causation for professional negligence, breach of fiduciary duty and breach of contract.<sup>23</sup>

**V. There Are Sound and Important Reasons Justifying a Petition for Writ of Certiorari.**

The Court of Appeals' opinion is in direct conflict with a host of prior Supreme Court decisions for standard of review on a motion for a directed verdict that requires the evidence and inferences from the evidence be viewed in the light most favorable to the nonmoving party.<sup>24</sup>

The Supreme Court has the discretion to grant a writ of certiorari and is not limited by the five examples listed in Rule 242(b), SCACR. Instead, Rule 242(b) specifically notes that the five reasons listed are "neither controlling nor fully

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<sup>22</sup> App. 878:21-24.

<sup>23</sup> App. 995.

<sup>24</sup> See *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) ("[W]e apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party."); *Town of Hollywood v. Floyd*, 403 S.C. 466, 480, 744 S.E.2d 161, 168, *reh'g denied* (July 12, 2013) (same), *cert. denied sub nom. Floyd v. Town of Hollywood*, S.C., 134 S. Ct. 792, 187 L. Ed. 2d 595 (U.S.S.C. 2013); *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012) (same); *Fairchild v. S. Carolina Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411 (2012) (same); *Mullinax v. J.M. Brown Amusement Co., Inc.*, 333 S.C. 89, 92, 508 S.E.2d 848, 849 (1998) (same).

measuring the Supreme Court's discretion or power to grant review in general" and simply "indicate the character of reasons which will be considered." However, in this matter, the trial judge granted directed verdict based on an error of law and Court of Appeals affirmed that ruling based on an error of fact and error of law. This Court has long held that "[i]n ruling on directed verdict motions, the trial court must view the evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the non-moving party."<sup>25</sup> The case must be submitted to the jury if more than one reasonable inference can be drawn from the evidence.<sup>26</sup> Further, this Court has held that "[i]n reviewing an order granting directed verdict, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the party against whom the directed verdict was granted." The Court of Appeals ignored the trial court's erroneous findings and affirmed based on its own erroneous determination that "no evidence" existed on the record. That determination, however, is controverted by the trial record and fails to conform to this Court's prior decisions on appellate review of directed verdicts.

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<sup>25</sup> *Mullinax v. J.M. Brown Amusement Co., Inc.*, 333 S.C. 89, 92, 508 S.E.2d 848, 849 (1998).

<sup>26</sup> *Id.*

## CONCLUSION

The Court of Appeal's erred when it ignored evidence in the record establishing a *requirement* for a closing on the conservation easement by December 31, 2007, because of significant tax changes in 2008 that would substantially reduced the tax deductions available to JFF. The evidence in the record established the parties' intent to close in 2007, until Respondents, as tax counsel for the \$42M transaction, withdrew 10 days before the last date to close in 2007.

In denying the first Rule 50 motion at the close of Yancey's case, the trial court stated "I think there is a question of fact to submit to the jury and I respectfully deny the directed verdict motion but it's close, I'm telling you that, the causation, but I think there is enough there from the 30(B)(6) witness and Mr. Harrah, all that combined together is enough to get past this motion. That's my ruling."<sup>27</sup> It follows that, if there was evidence in the record to prove causation as to the breach of fiduciary duty claim, the professional negligence claim, and the breach of contract claim to deny the first directed verdict motion, that evidence could not have been eliminated by the Respondents' presentation of their case. Yancey's evidence might have been called into question or controverted by Respondents presenting their case, but that would be a question for the jury, as the trier of fact, to weigh the evidence and make a final determination. The trial court improperly weighed the evidence and, in so doing, improperly granted Respondents' second Rule 50

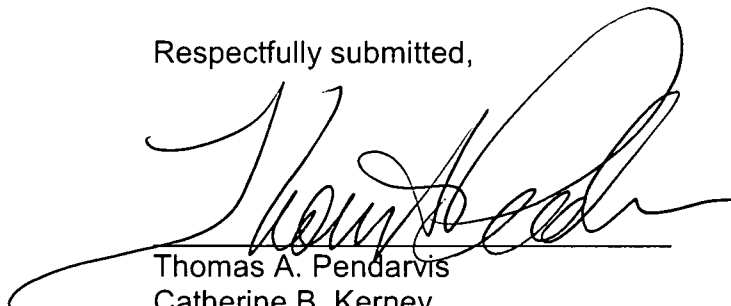
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<sup>27</sup> App. 688.

motion.

By granting the Petition for Writ of Certiorari, the Court has the opportunity to provide guidance to the bench and bar on the varying standards of proof for causation for legal malpractice, breach of fiduciary duty and breach of contract claims, as well as the opportunity to correct the errors made by the trial court and the Court of Appeals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas A. Pendarvis', written over a horizontal line.

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June 5, 2015

Beaufort, South Carolina

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In The Supreme Court

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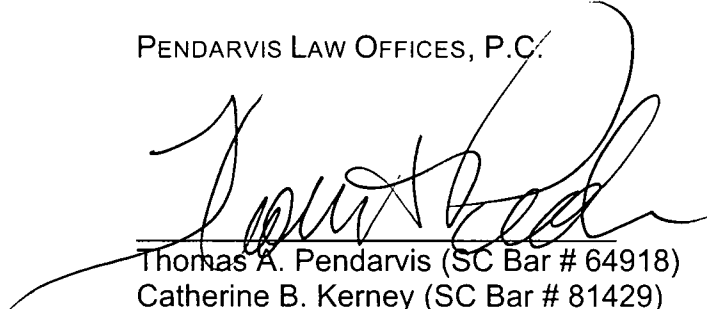
**PROOF OF SERVICE**

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I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI on counsel for Respondents, Susan P. McWilliams, J.D., Daniel C. Leonardi, J.D. and Burl F. Williams, J.D., by depositing a copy of the same in the United States Mail, postage prepaid, on the 5<sup>th</sup> day of June, 2015 addressed as follows:

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